IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

Ninth Circuit

UNITED STATES OF AMERICA,

Appellant.

— *vs.* —

W. S. BENNETT AND JOSEPHINE BENNETT, HIS WIFE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. FRANK H. RUDKIN, JUDGE.

APPELLEES' OPENING BRIEF.

P. D. SMITH, CONCONULLY, WASHINGTON,
Attorney for Appellees.

RECORD--CONCONULLY

STATEMENT.

Salmon Creek has its rise and flow in Okanogan County, Washington. This case involves, not the RIGHT, of appellees to use the waters of this stream for irrigation and domestic purposes, but rather the EXTENT, to which they are entitled to use them.

The waters of this stream were actually appropriated and applied to a beneficial use on the lands of appellees in the year 1887 (Record, p. 189) by Nathan Smye (not Smyth), the immediate grantor and predecessor in interest of appellees; and they have been used for irrigating said lands continuously since said date. In the interest of time, most of the proof in respect to this title was dispensed with by stipulation, found on page 120 of the Record, and is as follows:

> "Mr. SMITH: It is stipulated and agreed, as I understand it, between the plaintiff and defendant in this case, that the defendant has a prior right over the plaintiff to the use of the water in Salmon Creek for all the land that they irrigated by actual diversion and use, and that that use has extended over a period of more than ten years prior to the commencement of this action, except as to the patch of ground that has been referred to, and will be referred to as the rocky ground, that tract to remain open to proof as to the time on which water has been used, if at all.
>
> "Mr. CAIN: It is satisfactory with the qualification that they are entitled to the use of so much as can be used by economical methods.

"THE COURT: According to the usual course of husbandry in that country."

The area of the rocky land referred to in the stipulation is a little less than thirteen acres, making appellees' total area to be irrigated from Salmon Creek 62.82 acres.

It might be well to fix in our minds at this time the fact that the Government made its appropriation of the surplus waters of said creek in the year 1905. By turning to page 201 of the Record, we find that appellees have irrigated that rocky ground every year since they have been in the country—1902. This testimony is not disputed; and the honorable trial judge finds it as a fact in his opinion in this case. This brings the whole of appellees' 62.82 acres ahead of the Government's appropriation.

We are now introduced to the ultimate inquiry in this case: How much water are the appellees entitled to use to meet the requirements of their prior appropriation?

ARGUMENT.

Assignments of Error I and VI.

It seems to us that these two assignments are identical, and for that reason would ask the liberty to discuss them jointly. These two assignments allege that the appellees were awarded a greater amount of water than is necessary to satisfy the requirements of their prior appropriation. The question presented is solely one of fact. The character and requirements of appellees' lands are well summarized by the Court in its opinion at page 240, thus:

"The testimony clearly shows that the defendants' land has a gravelly, porous sub-soil and requires an unusual quantity of water to properly irrigate it. The crops grown by the defendants, consisting of alfalfa and timothy and clover, also require a greater quantity of water than do orchards and other crops that might be mentioned."

We contended for one miner's inch per acre under a six inch pressure, measured at the land. We caused the land and soil to be examined and tested by six different people, four of them engineers, and all practical irrigators except two. In addition to these are the witnesses Munson and Carpenter, who for years have been living on and irrigating lands adjoining those of Mr. Bennett. All of these men, eight in number, place Mr. Bennett's needs at not less than one miner's inch per acre, under a six inch pressure, at the land. Notwithstanding this, instead of allowing us 63 inches at the land, the court allowed us what is equal to about 60 inches at the intake, requiring us to carry the water nearly two miles through an open ditch, and in which the loss is admitted to be heavy. We recount briefly these facts merely to show that the evidence overwhelmingly supports the decree. That being true, under the familiar rule, the findings of the trial court will not be disturbed on appeal.

Assignments II and III.

We think these two assignments should also be considered together. They complain that the decree is based upon a ruling of the Court that the appellees are entitled to maintain the same methods of use em-

ployed by them before the Government acquired any rights, and in accordance with the usual course of husbandry in that part of the country. This is exactly what the court should have done, and had it done otherwise, it would have failed in applying the law.

In *Roeder v. Stein,* 23 Nev. 92, 42 Pac. 867, it is said:

> "Conveying it through a ditch, even, will always cause some loss, and if the distance is great, or the soil loose or porous, the loss will be considerable. This, within any reasonable expense, is generally unavoidable. But, however this may be, if the appropriation has been made before others acquire rights in the stream, after that no change can be made to their detriment. The first appropriator must continue to use it in at least as economical manner as before, and cannot change the method of use so as to materially increase the waste."
>
> "In determining the amount of water which a user applies to a beneficial use, and to which he is entitled as against a subsequent appropriator, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard, although a more economical method might be adopted."
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> *Wiel on Water Rights,* (3d ed.) p. 509.
>
> *Rogers v. Pitt,* 89 Fed. 420.
>
> *Rogers v. Pitt,* 129 Fed. 932.
>
> "In this case we have a large body of land which has been irrigated almost a lifetime. These old settlers took advantage of the United States

statute of 1866, authorizing settlers to acquire title to the use of water in this manner, and they have secured it, at least to the amount needed and used, and now an effort is being made to reduce the amount to which they supposed their title was perfect. Their methods of use have been those which were the least expensive, and, no doubt, to some extent extravagant, yet they cannot be expected to install methods now that might reduce to a minimum the amount of water necessary, at a cost that would absorb the profits. A great saving in the amount of water may be possible by adopting the Government Reclamation methods (cited as authority here) of cement ditches, to prevent both seepage and evaporation, with experts to follow and apply the water, by which it is contended that a half inch to the acre is sufficient; but at this time it is to some extent an experiment whether the investment on that basis will be remunerative, at least on the small farms. Furthermore, these government projects are for a new and an original use of water, upon which the government can impose such terms as it may see fit. Here the users have acquired the land and applied the water, which are valuable under present conditions, and their rights therein are vested, and we can require them only to use the water economically and reduce the quantity to a minimum by reasonable and cheap methods according to their situation and condition."

Little Walla Irr. Union v. Finnis Irr. Co., (Ore.), 124 Pac. 666.

But all this is begging the question. No witness has said that Mr. Bennett ever made any wasteful use of the water. There has been some intimation that his land is not in the best of condition for irrigation, but Mr. Muldrow, one of the Government's own witnesses, and formerly connected with the Reclamation Service, testified on that subject at page 34 of the Record as follows:

> Q. Is Mr. Bennett's land properly leveled for irrigation in your judgment?
>
> A. Its grades are not at all bad considering ordinary practice.

Mr. Bonstedt, another witness for the Government, and until recently, Project Engineer for the Government Okanogan Project, testified on page 55 as follows:

> Q. Will you state the condition as to cultivation on the defendants' property, whether or not it is in proper shape for economical irrigation?
>
> A. In my opinion, it is not in shape for high duty of water.
>
> Q. It is in average shape for the Okanogan country?
>
> A. Yes sir.
>
> Q. The old-time water rights?
>
> A. Yes sir.
>
> Q. Or both?
>
> A. It is in average shape for the method used in that country for irrigation.

On cross-examination, at page 65, he continues:

> Q. I understood you to say that Mr. Bennett's place was not in very good shape for cultivation. Was that right? Did I understand you correctly?

A. I stated that it was in as good shape as any lands up there.

* * * * * *

Q. Mr. Bennett is one of the very best farmers in that country, isn't he?

A. He is considered a very good farmer.

Mr. Bennett has been irrigating for twenty-five years — not theorizing and telling others how to irrigate, but actually irrigating, and we venture to say that by this time he knows something about it. Substantially all of his witnesses in this case were practical irrigators of long experience, and that is the kind of testimony the court wants.

Wiel, Water Rights, (3d ed.) 696.

Roberts v. Wilmarth, 40 Colo. 184, 95 Pac. 301.

Twaddle v. Winters, 22 Nev. 88, 85 Pac. 280, 89 Pac. 289.

Rogers v. Pitt, 129 Fed. 932.

After looking over the land and examining it they have said it will require one miner's inch per acre under a six inch pressure to irrigate it so as to produce crops to the best advantage. There has been no waste, and the trial court has not allowed for any, as will be seen from his opinion on page 241 of the Record, as follows:

> "I think an allowance of one and one-half cubic feet per second of time, to be measured at the point of diversion from the river, if properly used and husbanded, will be ample to supply all the needs of the defendants," etc.

If anyone should complain of the decree in this case it is the appellees, but we have felt that we

received a fair and impartial trial, and at the hands of a just and able jurist. With this confidence, and the hope that the seven years of nagging and intimidation by local reclamation officials had come to an end, these old people were content to abide the judgment.

Assignment IV.

This assignment complains that the decree awards the use of water to appellees during a longer irrigation season than is shown to be necessary. This involves only a question of fact. In view of the fact that the courts take judicial knowledge of the climatic conditions of the country, it should not require much proof to convince the court that April 15th to September 15th is the irrigation season in this country, but the finding is amply supported. By turning to the testimony of Mr. Bonstedt at page 60 of the Record, we find the following:

> Q. Are the farmers actually raising three crops of alfalfa in the Okanogan country without receiving water in April and September?
>
> A. Well, they all apply it during those months.
>
> Q. What is that?
>
> A. They generally apply water during those months. I would like to modify that, during the first—during the last half of April and the first half of September.

When the farmers use the water is the very best evidence of the irrigation season.

Assignment V.

This assignment presents two questions. The

first relates to the quantity of water necessary for appellees' use. That feature has already been discussed. The second alleges error of the court in failing to enter a decree, "awarding in the alternative, water sufficient for the growth of alfalfa, or for orchard purposes, accordingly as the lands under consideration might be devoted to such uses." So far as we have been able to find, this is a question of first impression. We had supposed it to be well settled that a man who goes upon the public domain, constructs an irrigation ditch, diverts and applies the water to a beneficial use, acquires a vested right to the quantity of water beneficially used prior to the initiation of adverse rights; that the right is property in the highest sense; that the owner can change the place and manner of use, (so long as subsequent rights based thereon are not interfered with) or may sell it. Counsel for the Government appear to entertain the notion that if at some future time the lands of appellees should cease to be devoted to the growing of forage crops, and be planted to fruit, they would forfeit about half their water right—fruit requiring only about half as much water as forage crops. In other words, the Reclamation Service is saying to us: "If ever you go into the fruit business, we will take half your present water right and sell it." And it feels aggrieved that the trial court did not adopt that idea and determine in this action how much of appellees' right should be confiscated upon the happening of such an event. Such a decree would be very far reaching, and would hardly be in keeping with the constitution and laws of a country where property rights are supposed to be sacred. Such a blow at vested rights is so palpably

hideous as to make it unnecessary to prolong the discussion or cite authorities. If at some time the appellees should change to crops requiring less water, why not let them, the owners, sell the surplus, or apply it to other lands?

Assignment VII.

This assignment alleges error "because said decree awards to defendants vested rights in the water in controversy in excess of their necessities, the title to said water being in the public, under police powers of regulation, to be exercised with the view of obtaining the greatest possible use of the same." The errors here alleged are so blended with others already touched upon that we shall notice only that part which refers to vested rights and the police power.

Appellees' water right was acquired under Sec. 2339, Revised Statutes of the United States, which, so far as material to this inquiry, reads:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." * *

This section applies to water and ditch rights accrued since as well as before its passage.

Jacob v. Lorenz, 98 Cal. 335.

In applying that section, the Supreme Court of Washington, in the case of *Isaacs v. Barber*, 10 Wash. 124, said:

"Each of these propositions raises questions of the utmost importance, and we have given them such careful consideration as our opportunities would allow, and have come to the conclusion that this state, or at least that portion of it east of the Cascade mountains, was included within the territory where the right to prior appropriation of water for mining and other beneficial purposes was recognized by the courts and the law-making power, and that such right was established by a custom so universal that courts must take judicial notice thereof. We therefore hold that the right to prior appropriation as recognized by said act of Congress existed as a part of the laws and customs of the locality."

Again, in *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566-569, it is said:

"It is the opinion of the court that the prior appropriator of the flow of any water over the public lands of the United States has a vested right therein."

We would not pass this case, however, without calling the Court's attention to the fact that it has been overruled in part by the later case of *Benton v. Johncox*, 17 Wash. 277, but not on the question above announced. To the same effect, see:

Wold v. May, 10 Wash. 157.

Offield v. Ish, 21 Wash. 277.

Benton v. Johncox, supra.

Authority could be multiplied indefinitely, but enough has been seen to show that it is the established rule in the State of Washington that a water right

acquired by prior appropriation is a vested right. That being true, the next inquiry is as to what effect the police power has on vested rights of this nature. At the outset, we might suggest that the police power in cases of this kind rests in the state and not in the United States. The State of Washington has made no police regulations affecting the case at bar, but even if it had, it is not competent for the state to invade vested rights under the guise of police power.

Speaking of the police power of regulation, Mr. WIEL, in his work on *Water Rights* (3d ed.), p. 1103, Sec. 1193, says:

> "As it is true of administrative officers generally, irrigation or water officials cannot authorize acts injuring existing owners; their action is invalid where it has that effect. They cannot cut down the vested rights of prior appropriators or put them to unnecessary inconvenience to suit the benefit of subsequent appropriators. Their authorization cannot legalize a wrong upon existing claimants, nor abridge their rights."

To support the text the author has collected a great array of authorities in the notes to the above section.

On the whole case, we respectfully submit that the judgment of the honorable trial court be affirmed.

Respectfully submitted,

P. D. SMITH,

Attorney for Appellees.

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